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March 10, 2000

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BY HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby TW-A325
Washington, D.C. 20554

Re: Ex Parte Presentation, Provision of Directory Listing Information Under the Telecommunications Act of 1934, As Amended, CC Docket No. 99-273

Dear Ms. Salas:

On behalf of Telegate, Inc., and pursuant to Section 1.1206(b) of the Commission's rules, there are submitted herewith two copies of an ex parte written presentation in the above-captioned docket. This presentation provides addition information concerning Telegate's proposal for presubscription of 411 directory assistance services in this proceeding and is submitted at the request of the Commission staff.

Should there be any questions concerning the attached materials, please contact the undersigned.

Very truly yours,

Kelly Cameron

Kelly Cameron

For Powell, Goldstein, Frazer & Murphy LLP

KC/rlg
Attachments
Cc: Attached service list

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Provision of Directory Listing	)	CC Docket No. 99-273
Information Under the	)	
Telecommunications Act of 1934,	)	
As Amended	)	

To: The Commission

EX PARTE PRESENTATION OF TELEGATE INC.

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Its Attorneys

March 10, 1999

Summary

In this proceeding, the FCC has a historic opportunity to open a $3 billion market to full and fair competition by allowing presubscription for directory assistance (DA) service. Telegate has proposed in its comments in this proceeding that the FCC give all providers of directory assistance the opportunity to use the universally recognized DA dialing code, 411. In this filing, Telegate explains more fully why and how the Commission should do this. As demonstrated below, the public interest benefits of DA presubscription far outweigh the modest one-time costs of implementation.

Telegate, which is a competitive provider of DA services in Germany, is committed to bringing the benefits of DA competition to the U.S. market. As it has in Germany, Telegate would provide reliable, high-quality service to U.S. consumers. In addition, Telegate is committed to providing service to underserved populations, such as the large non-English speaking population in the United States. And, Telegate would produce new jobs at call centers located around the United States as it has in Germany where Telegate has been recognized as employer of the year by the Ministry of Economics for creating over 2000 new jobs, most of them in high-unemployment areas.

While it is perhaps obvious that competition benefits consumers, it is less obvious how easily DA presubscription can be implemented. In fact, however, presubscription of 411 can be accomplished by using Advanced Intelligent Network (AIN) features already deployed nationwide. Other advanced services, including local number portability, Caller ID, and calling card services, are already being delivered in much the same way.

The Commission has frequently ordered carriers to make major investments in new infrastructure in order to permit competition. In this case, however, the investment required to make the DA market competitive would be extremely modest. Telegate estimates that the incremental investment needed to implement 411 presubscription is only $21 million. This translates to a one-time cost of about 11 cents per subscriber.

In order to allow competitive DA providers to become established in the market, the Commission should also follow the approach it adopted in opening the long distance market to competition. Telegate urges the FCC to order a process of balloting and allocation for initial customer selection of their DA provider. Telegate estimates that this process can be accomplished for slightly more than $1.00 per line. Balloting and allocation greatly accelerated the pace of competition in the long distance market and it can have a similar effect in the DA market.

Although Telegate initially proposed DA presubscription in its comments in this proceeding, no other party addressed the issue. Telegate therefore believes that the Commission should release a public notice seeking further comment on Telegate's proposals and the technical and economic studies underlying them. Telegate urges the Commission to act quickly to adopt rules for DA presubscription that will permit the development of robust competition in the DA market.

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Attachment A – Affidavit of John Celentano

Attachment B – Affidavit of Stephen E. Siwek

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Provision of Directory Listing Information	)	CC Docket No. 99-273
Under the Telecommunications Act of 1934,	)	
As Amended	)	

EX PARTE PRESENTATION OF TELEGATE INC.

I. Introduction

In its Notice of Proposed Rulemaking in CC Docket No. 99-273, the Commission tentatively concluded that non-carrier providers of directory assistance are bringing the benefits of competition to consumers and that the Commission should encourage such competition. [1] Therefore, the Commission proposed to create a more competitive market for directory assistance (DA) service by eliminating barriers to entry by competitive providers, including non-carrier providers of DA service. In particular, the Commission proposed to allow *all* providers of DA – whether they are carriers or not – to have nondiscriminatory access to the DA databases maintained by incumbent local exchange carriers (ILECs).

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1 Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended, CC Dkt. No. 99-273, *Notice of Proposed Rulemaking*, 14 FCC Rcd 15550, 15645 (1999) (*NPRM*).

Like many other telecommunications services, DA is heavily influenced by its origin as a monopoly service. Before the advent of local competition, there was no apparent need to require ILECs to share their DA databases or otherwise open the DA market to competition. Today, however, if the Commission allows incumbents to retain the advantages of monopoly, the incumbents will be able to stifle competition in this emerging market.

Telegate believes that, in order to bring the full benefits of competition to consumers, the Commission must eliminate another barrier to competition – the ILECs' exclusive control over 411, the universally recognized DA dialing code. Just as equal access and 1+ dialing were vital to creating a competitive long distance industry, access to 411 is essential to creating competition in the directory assistance market. Otherwise, the ILECs will be able to leverage their historic domination of local markets into an anticompetitive advantage as they expand into new markets for long distance and international DA services. Accordingly, in its comments in this proceeding, Telegate proposed that the Commission require presubscription of 411 in order to achieve the Commission's goal of promoting competition in this market.

By this filing, Telegate provides a more comprehensive explanation of the technical and economic feasibility of its proposal for the presubscription of directory assistance service. This filing, and the supporting affidavits of expert consultants, demonstrates that presubscription of directory assistance using the 411 dialing code can be achieved without requiring substantial technical changes to the network and for a modest cost.[2]

In addition, this filing shows that Telegate's proposal is fully consistent with the Commission's objective of extending the benefits of competition to all segments of the telecommunications industry. Indeed, DA presubscription is essential to making the measures the Commission proposed in the NPRM truly effective tools to promote competition. Therefore, the Commission should use this proceeding to mandate presubscription of 411 as a means of promoting competition in the DA industry.

II. The Commission Can Create a Competitive Market for Directory Assistance by Adopting Telegate's Presubscription Plan

A. Competition in Directory Assistance Will Serve the Public Interest

Telegate, like other new entrants in the directory assistance market, fully supports the proposals in the NPRM, as our comments demonstrate. Telegate also believes, however, that the Commission must do more than it proposed in the NPRM in order to create robust competition in this market. As in other segments of the telecommunications industry, entrenched incumbents enjoy tremendous advantages in the directory assistance market. A number of companies have attempted to enter the directory assistance business

2 In its comments in this proceeding, Telegate also proposed an alternative method of putting all DA providers on a competitively equal footing. Specifically, Telegate proposed that the Commission could prohibit the use of 411 for DA and instead mandate that all providers of DA – including ILECs – use some carrier-specific DA dialing code. Telegate now believes, however, that presubscription of 411 is a far superior method of promoting competition because it will be less costly to implement and will create far less customer confusion than eliminating the use of 411.

but the ILECs' control over the universally recognized DA dialing code, 411, has severely hampered these efforts. In fact, DA competitors are limited to being outsourcers for carriers or to providing cumbersome "dial around" access to stand alone DA services.

For this reason, the Commission must take further steps in order to promote the development of a competitive DA industry. Specifically, the Commission must implement presubscription of the universally recognized DA dialing code, 411, and require balloting and allocation of 411 customers as it did in introducing competition in the provision of 1+ interLATA service 15 years ago.

1. Consumers Are Harmed by Monopoly Provision of Directory Assistance

As the Commission has recognized in the NPRM, the DA industry has become more competitive in recent years. The stranglehold of the ILECs on both DA databases and 411, however, threatens to stifle competition. This is especially true because ILECs are increasingly using 411 to provide non-local DA, i.e. national directory assistance. The ILECs are seeking in this way to leverage their bottleneck control of the local exchange market into the already liberalized market for non-local DA. This will inevitably limit choice in the market for both local and non-local DA by making the ILECs the dominant provider of both.

The Commission has long understood that monopolies do not serve the public well. This is becoming increasingly apparent in the DA market. Recently, for example, Pacific Bell applied to the California Public Utilities Commission (CPUC) for a rate increase of up to 300% for directory assistance. The requested rate increase would have generated an additional $120 million in revenue annually for Pacific Bell. The CPUC received an unprecedented 34,000 written comments from the public in response to Pacific Bell's application, with the vast majority opposing the application due to lack of competition, the substantial rate increase proposed, and current poor service from Pacific Bell.[3] Many of the commenters complained that Pacific Bell could only propose such a massive rate increase because it faces no competition. In its strong opposition to the application, the CPUC's Office of Ratepayer Advocates (ORA) stressed that Pacific retains a monopoly over directory assistance services using 411 and that consumers have no direct substitutes for Pacific Bell's DA services.[4] Indeed, as one Pacific Bell customer put it,

> Competition is non-existent and there is no recourse for the individual in the marketplace save government intervention. I base my objection on the fact that I'm disabled, with the use of only one hand, so it is difficult to manage the use of a telephone book. In addition, I am rapidly losing my eyesight so that the ability to access an information operator for a reasonable fee is a necessity.[5]

As a result, of course, Pacific Bell's directory assistance service and rates are not disciplined by the marketplace and the CPUC must therefore continue to regulate Pacific Bell's DA rates.

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3 *See* In the Matter of the Application of Pacific Bell (U 1001 C), a Corporation, for Authority for Pricing Flexibility and to Increase Prices of Certain Operator Services, to reduce the Number of Monthly Directory Assistance Call Allowances, and Adjust Prices for four Centrex Optional Features, Application 98-05-038, (Pacific Bell Application), Cal. Pub. Utils. Comm'n Decision No. 99-11-051, at 6 (Nov. 18, 1999).

4 *See* Office of Ratepayer Advocates Opening Brief in response to Pacific Bell Application No. 98-05-038 at 8 (May 5, 1998).

5 Office of Ratepayer Advocates Protest in response to Pacific Bell Application No. 98-05-038 at 8 (May 5, 1998).

The lack of effective competition will, of course, cause predictable harm to consumers. This harm will include poor service and reduced innovation. And effective competition is possible only when new entrants have a fair opportunity to compete. For directory assistance, this means allowing presubscription to 411.

2. Experience Shows That Directory Assistance Competition Works

In contrast to the poor service and rising prices California consumers face, a competitive DA market produces high-quality, innovative service and other public benefits as well. In Germany, where Telegate competes with the former monopolist, Deutsche Telekom, consumers may now choose their DA provider.[6] Telegate not only provides extremely high-quality basic DA service, it also has initiated service to underserved communities, such as the large Turkish-speaking population in Germany, and specialized information services. In addition, in just three years, Telegate has created over 2000 new jobs, mostly in areas of chronically high unemployment in Eastern Germany. In recognition of this fact, the German government recognized Telegate as the Employer of the Year in 1999.[7]

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[6] In Germany, however, consumers select their DA provider on a per-call basis by dialing the provider's unique dialing code. No DA provider retains the historic DA dialing code, however, so providers compete on a level playing field.

[7] The Press Release announcing this award can be viewed (in German) at http://www.telegate.de/presse/aktuelles_fset.html.

U.S. consumers deserve no less. Competitive DA providers, with no position in the market, would have to challenge the incumbent by providing better, more reliable service. In addition, Telegate, and likely other new entrants as well, would provide directory assistance to underserved populations in the United States, such as the large communities that do not speak English. These consumers today have extremely limited access to directory assistance.

The directory assistance business is now approximately a $3 billion market. Consumers deserve the right to choose in this market just as they do in other segments of the telecommunications industry. The Commission can guarantee them that right – and the benefits of competition – by implementing presubscription of 411. If the Commission does not take this action, directory assistance will remain a monopoly plagued by poor service quality and little or no innovation or responsiveness to customers' needs.

B. The Commission Can Prevent Abuse of Market Power by Implementing 411 Presubscription

1. ILECs Retain Substantial Market Power in the Directory Assistance Market

Although the NPRM states that "the provision of directory assistance has become increasingly competitive," it is also clear that ILECs continue to enjoy substantial market power in this industry.[8] In fact, in the telecommunications industry four years after the enactment of the Telecommunications Act, DA remains one of the last bastions of

[8] *NPRM* at 15645.

monopoly power. As the Commission noted in the NPRM, carriers other than the ILEC may not have the economies of scale to construct and maintain a directory assistance platform of their own. That is why the Commission proposed to require ILECs to grant nondiscriminatory access to the DA databases to all providers of directory assistance. The ILECs control this valuable asset – database access – only because of their historical monopoly status.

But the ILECs' market power also derives from their exclusive control over 411, another vestige of their past monopoly. Indeed, the changing nature of the directory assistance business, while promising to bring more competition, could instead further entrench the incumbent monopolist providers of directory assistance. This is because ILECs have begun to provide non-local DA to their customers – using 411, of course.[9] Traditionally, customers could only obtain local DA from their ILEC, typically by dialing 411. In order to obtain non-local DA, in contrast, a customer would have to dial (NPA) 555-1212. *Only* ILECs can now provide local and non-local DA using the universally recognized 411 dialing code. Consequently, ILECs will have an enormous advantage – control of 411 – owing solely to their former monopoly status.

The advantage created by the ILECs' control of 411 is reinforced by the proliferation of new, unfamiliar NPAs, which forces consumers to seek non-local DA

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[9] Indeed, it is clear that US West and other ILECs have begun providing non-local DA without seeking any form of FCC approval first. *See e.g.* In the Matter of Petition of US West Communications, Inc., for a Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of US West Communications, Inc., for Forbearance; The Use of N11 Dialing Codes and Other Abbreviated

more frequently. Precisely because the new NPAs are unfamiliar, however, consumers are likely to dial 411 – not some also unfamiliar DA code - in order to obtain non-local DA. Moreover, consumers may often be unsure whether a DA request is local or not due to NPA changes.

The Commission's proposal to mandate nondiscriminatory database access is essential to allowing competition to flourish in this market, as Telegate and other commenters have already stated. As the Commission tentatively concluded, non-carrier providers of directory assistance cannot compete without access to directory assistance equal to that provided to providers of telephone exchange service and telephone toll service.[10]

By the same token, however, competitive providers of directory assistance cannot effectively compete unless they are given non-discriminatory access to the universally recognized directory assistance number, 411.

2. The Commission Has Found Use of 411 for Directory Assistance To Be in the Public Interest

The Commission itself has recognized the importance of 411 as a universally recognized DA dialing code. There are only eight possible N11 dialing codes that can be assigned in the North American Numbering Plan. In the face of numerous competing

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Dialing Arrangements, Memorandum Opinion & Order, 14 FCC Rcd 16252 (1999) ("*US West NDA Order*").

10 *NPRM* at 15648.

proposals for use of N11 codes, the Commission has concluded that the continued use of 411 to provide directory assistance is justified by the public convenience and necessity.[11] In particular, the Commission noted that the very fact that 411 is so familiar to the public makes it valuable.

First, of course, 411 is valuable to consumers. As the Commission observed, even when customers are away from home, they know that they can dial 411 and obtain directory assistance.

Second, however, 411 is also very valuable to the ILECs. For this reason, the Commission prohibited ILECs from using 411 for the provision of information services, "unless that LEC offers access to the code on a reasonable, nondiscriminatory basis to competing enhanced service providers in the local service area for which it is using the code to facilitate distribution of their enhanced services."[12]

While the ILECs may not be using 411 to provide enhanced services, they are clearly enhancing the services they provide using 411. As the *US West NDA Order* attests, ILECs are using 411 to provide not only their traditional, monopoly local directory assistance services, but national DA as well. Indeed, as that order makes clear, US West (and presumably other ILECs as well) began offering non-local DA without seeking any

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[11] *See* Use of N11 Codes and Other Abbreviated Dialing Arrangements, CC Dkt. No. 92-105, First Report & Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5572 at 5600 (1997) (*N11 Order*).

[12] *Id.* at 5601.

type of FCC authorization to do so. Only after the fact did US West seek a declaratory ruling that its service was legal.[13]

Telegate does not begrudge ILECs the opportunity to be full competitors in all segments of the DA market – national as well as local. However, Telegate believes it is imperative for the Commission to follow the logic of the *N11 Order* and require that 411 be available to all competitors on reasonable, nondiscriminatory terms.[14] To do otherwise would be to allow the ILECs to leverage their market power in local DA into the market for non-local DA.

As the Commission recognized in the *N11 Order*, the use of 411 for information services would give ILECs a competitive advantage over their competitors because 411 is universally recognized as a DA code. The advantage to incumbents of having exclusive use of 411 for all types of directory assistance is even more substantial and more obvious, given that 411 is traditionally used for DA and not for information services. In fact, while some competitors, including AT&T and MCI-WorldCom, have launched competing "dial around" national DA services as a competitive response to national DA services offered by the ILECs, they have failed to make significant inroads, despite substantial, expensive marketing campaigns. The chances for smaller competitors to succeed in the present environment are thus highly questionable.

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13 *US West NDA Order* at 16258.

14 Although the provision of non-local DA, in itself, does not appear to be an enhanced service, as that term is defined in the Commission's rules, it is nevertheless an enhancement to the service traditionally available to customers who dial 411. As such, it is clearly unfair to allow the ILECs to use 411 to provide both local and non-local DA while other providers may not.

Just as it did when it introduced competition in the interexchange market 15 years ago, the Commission should give customers the opportunity to presubscribe to their preferred DA provider. Moreover, as it also did in the interexchange context, the Commission should require balloting and allocation as the fairest, most procompetitive method of implementing 411 presubscription. Presubscription, using balloting and allocation, produced a highly competitive long distance industry and it can produce the same results for the directory assistance industry as well.

III. Presubscription of 411 is Technically Feasible

Through discussions with leading switch manufacturers and others, Telegate has determined that 411 presubscription can be achieved without requiring major network modifications. We believe that the best method for achieving DA presubscription is by using software capabilities already deployed in the vast majority of central office switches in the United States.[15]

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[15] US West has confirmed to the Commission that it is possible to permit access to multiple DA providers through presubscription, although US West did not explain how this can be accomplished. *See US West NDA Order*, 14 FCC Rcd at 16276, n.103.

The technical feasibility of DA presubscription is detailed in the attached affidavit of John Celentano.[16] As Mr. Celentano explains, Advanced Intelligent Network (AIN) software can be used to route a subscriber's DA calls to the subscriber's preferred DA provider. This technique will not require reprogramming of ILECs' central office switches. Instead, it will rely on the Signalling System 7 (SS7) network to route calls to a presubscribed DA provider instead of their current default destination, the ILEC's DA service bureau.[17] Indeed, AIN was developed precisely in order to prevent the need to reprogram thousands of central office switches when carriers introduce new services or functionalities. Today, for example, AIN is the basis for implementing local number portability and other advanced services.[18]

Under Telegate's proposal, as detailed in Mr. Celentano's affidavit, the impact of 411 presubscription on the ILECs' central office switches would be minimal. Indeed, the only change to central office switches would be made by a command that can be initiated from a carrier's Network Operations Center directing central office switches to activate the N11 Trigger feature contained in AIN software.[19]

When the N11 Trigger feature has been activated, the central office switch will launch a query over the SS7 network whenever a customer dials 411. The SS7 Signal

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16 Affidavit of John Celentano, attached hereto as Attachment A ("Celentano Affidavit").

17 *See* Celentano Affidavit at para. 9, 16. As Mr. Celentano notes, presubscription could also be implemented using a switch-based approach, but this would be vastly more costly and complex than Telegate's proposed AIN-based solution. *See Id.* at para. 8, 12-15.

18 *See Id.* at para. 9, 19, 23.

19 *See Id.* at para. 25, 26. As Mr. Celentano explains, the N11 Trigger is a capability included in AIN version 0.1. The Trigger is a software defined "hook that is specific to the associated service." *Id.* at para. 25.

Control Point (SCP) will contain the information that directs the central office switch to route the 411 call to the DA service bureau of the customer's presubscribed DA provider.

As we have noted, implementation of this solution will not require significant changes to central office switches. Implementation may, however, require some modest investment in upgrading SS7 infrastructure to maintain the database of customers' DA presubscriptions and to route 411 calls to DA providers.[20] Telegate believes that implementation of this solution would, at most, require the deployment of seven new SCPs and associated STP switches. Telegate estimates that the total investment – nationwide – to implement its proposed DA presubscription plan would be less than $23 million.[21] In addition, Telegate estimates that the annual expenses associated with operating and maintaining the databases and associated infrastructure would be approximately $7.1 million.[22] In comparison to the current estimated size of the DA market, almost $3 billion and growing, these amounts would be essentially trivial.

IV. Presubscription of 411 is Economically Feasible

As the foregoing summary of the Celentano Affidavit demonstrates, presubscription of directory assistance can be achieved without imposing significant technical burdens on ILECs, other DA providers, or hardware or software vendors. It

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20 Although calls to the ILECs' DA platform are now routed over dedicated trunks, under Telegate's AIN-based presubscription proposal 411 calls from the ILECs' presubscribed DA customers would likewise be routed pursuant to a query launched by the N11 Trigger.

21 *See* Celentano Affidavit at para. 51. *See also* Celentano Affidavit at Table 1.

22 *Id.* at para. 52.

follows logically from this that implementation of 411 presubscription also will not impose a substantial economic burden on the industry or consumers.

The attached Affidavit of Mr. Stephen E. Siwek confirms the reasonableness of the cost estimates contained in the Celentano Affidavit.[23] Moreover, Mr. Siwek notes that, on a per subscriber basis, the one-time capital investment in 411 presubscription is likely to cost – at most – approximately $0.11.[24] This is obviously a trivial cost for opening a whole industry to competition.

Moreover, because the size of the DA business is already substantial, the introduction of effective competition in the DA market will have significant benefits for consumers. Wireline directory assistance was already at least a $2.7 billion market in 1997. A very conservative estimate of the likely growth of the industry – even without implementation of presubscription and access to ILEC DA databases – suggests that this market will reach at least $3.3 billion two years from now. As Mr. Siwek observes, this is comparable to other segments of the telecom industry that the Commission has opened to competition after great effort.[25] Indeed, as a point of comparison, implementation of local number portability (LNP) is projected to cost billions of dollars while all competitors to ILECs had revenues of just under $2.5 billion in 1997.[26] In Washington,

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23 *See* Affidavit of Stephen E. Siwek, attached hereto as Attachment B ("Siwek Affidavit").

24 *See* Siwek Affidavit at para.25. It should be emphasized that the cost of implementation would be a one-time investment.

25 *See Id.* at para. 12.

26 Meanwhile, in 1998 it was reported that "incumbent carriers estimate that they have spent between $2.5 billion and $3 billion collectively to implement LNP". *FCC Issues Long-Anticipated Cost Recovery Order for Local Number Portability*, COMMUNICATIONS TODAY, May 7, 1998, at 7.

DC, Bell Atlantic is already collecting a surcharge of $0.46 per month per subscriber for LNP implementation, or roughly 145 times the likely one-time, per subscriber cost of 411 presubscription.[27]

Effective competition in directory assistance can be expected to provide consumers with greater choice, service innovation, and responsiveness to the needs of consumers, particularly of underserved populations. This has been the experience in Germany, where Telegate has managed to capture approximately 20% of the DA market in just over two years. As shown in Mr. Siwek's Affidavit, in the first quarter of 1999 Telegate achieved annualized volume of 78 million DA calls.[28] Telegate earns high marks in Germany for accuracy and customer service, two features that are often lacking in the monopoly U.S. DA market. Telegate strives for 92 percent database accuracy, which, when combined with its "always a human voice" policy, produces high levels of customer satisfaction.

As Mr. Siwek's affidavit also demonstrates, however, the Commission must also adopt a balloting and allocation system for presubscription of directory assistance service if competition is to fully take hold in the DA market. Following the divestiture of the Bell System, the Commission confronted similar issues in deciding how to introduce effective competition in the interexchange market. The Commission ultimately adopted a system developed by Northwestern Bell Telephone Company under which customers

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27 Mr. Siwek calculates that, if recovered over three years, the cost of 411 presubscription would amount to approximately 0.317 cents per subscriber, per month. *See* Siwek Affidavit at para. 25.

28 *See Id.* at para. 8.

were given an opportunity to select their interexchange carrier by a ballot. Customers who did not select an interexchange carrier were allocated among interexchange carriers on a pro rata basis. As Mr. Siwek notes, this balloting and allocation procedure greatly increased competition in the interexchange market and hastened the growth of new entrants by overcoming some of the incumbent firm's advantages.[29]

Balloting and allocation proved to be an efficient and effective means of promoting competition in the interexchange market. The record before the Commission when it mandated balloting and allocation demonstrated that the cost of this process was only $0.75 per line.[30] Even allowing for the increased cost of postage in the intervening years, Mr. Siwek calculates that a generous estimate of the cost of conducting balloting and allocation for presubscription of directory assistance would be a one-time cost of $1.13 per line.[31] In reality, this cost could be significantly lower given that other costs – such as the cost of computers – have declined considerably in the last 15 years.

As the Siwek Affidavit shows, balloting and allocation allowed new entrants to gain a foothold in the market. In contrast, had the Commission not mandated balloting and allocation for interexchange presubscription, a substantial percentage of the market would have remained with AT&T by default.[32] In the DA industry, allowing customers simply to default to the ILEC would likely have even more severe anticompetitive effects. As we have noted, ILECs are increasingly providing not only local but also non-local or

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29 *See Id.* at para. 29 et seq.

30 *See Id.* at para. 30.

31 *See Id.* at para. 31.

national DA.[33] To allow the ILECs to retain all default customers would allow the ILECs to leverage their historical market power in local DA into the emerging national DA market. Such a result would be directly contrary to the main goal of the Telecommunications Act, to require ILECs to open their markets before being allowed to expand into new markets. The Commission can prevent this result for a modest cost of approximately $1 per line.

V. Telegate's Proposals Are Consistent with the Communications Act, the Administrative Procedure Act, and Commission Precedent

Telegate's proposal to implement presubscription of directory assistance through balloting and allocation of end users will promote competition in the provision of directory assistance and is within the scope of the NPRM in this docket. The Commission properly may, and, indeed, should resolve these important issues in this proceeding.

As we have noted above, the Commission's stated objective in the NPRM in this docket is to "encourage . . . competition in the provision of directory assistance, whether or not the particular directory assistance provider also provides telephone exchange service or telephone toll service."[34] The historical monopoly ILECs enjoy over the use of the 411 dialing code constitutes a major impediment to competition in the provision of

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32 *See Id.* at para. 32 et seq. *See also* Tables I & II.

33 In the context of the interexchange market, this would have been analogous to defaulting long distance customers not to AT&T but to the RBOCs, a clearly unacceptable result.

34 *NPRM*, 14 FCC Rcd at 15645.

directory assistance. In view of the overall purpose of this proceeding, it is entirely appropriate for the Commission to adopt rules removing this barrier to competition.

The FCC can legitimately adopt rules implementing Telegate's proposal for presubscription of 411 and for balloting and allocation of DA customers based on the record before it. The Commission sought comment on proposals to promote competition in this market. In response to the NPRM, Telegate proposed not only that the Commission adopt the rules it had proposed concerning database access, but also that it implement presubscription. As discussed below, because DA presubscription, including balloting and allocation, is a logical outgrowth of the NPRM and comments the Commission has received, the issue is properly presented for action in this proceeding

Nevertheless, Telegate recommends that the Commission seek additional comment on this proposal in response to the instant *ex parte* presentation. Telegate was surprised that no party responded to its proposal for presubscription in reply comments filed in this docket. Although Telegate's proposals thus remain unopposed, the Commission may wish to assure itself that it has received sufficient comment on the subject from interested and affected parties before issuing a final rule. We therefore recommend that the FCC issue a Public Notice to provide interested parties yet a further opportunity to comment on Telegate's proposal for presubscription of directory assistance providers. This would allow the Commission to resolve these important issues without delay in the context of the instant proceeding and would also be completely consistent with the Commission's obligations under the Administrative Procedure Act (APA) and the Communications Act.

Under the APA and the Communications Act, the Commission has a duty to provide adequate notice to the public when initiating notice and comment rulemaking.[35] Notice is considered adequate when it allows the public to prepare meaningful comments regarding the subject of the proposed rule.[36] This does not mean, however, that the Commission may not deviate from its proposal when issuing a final rule. Both the Supreme Court and the D.C. Circuit have held that agencies are entitled to refine the class of issues addressed in the final rule in response to comments.[37] Thus, Telegate believes that interested members of the public already have received adequate notice that the Commission may adopt rules to promote competition in the directory assistance market, including the rules proposed by Telegate in its comments in this proceeding and further explained in the instant filing.

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[35] *See* Administrative Procedure Act 5 U.S.C. § 553(b) (1994) (requiring "General notice of proposed rulemaking [to] . . . be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof. . ."); 47 C.F.R. § 1.412(a) (1998) (stating the same).

[36] *See United Steelworkers v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980) (court held that, to be adequate, NPRM must "fairly apprise interested persons" of the issues to be addressed in the rulemaking).

[37] *See CFTC v. Schor*, 478 U.S. 833, 845 (1986) (court held that "it goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound"); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632, n.51 (D.C. Cir. 1973) (court held that "a contrary rule [that the final rule may not modify the proposal] would lead to the absurdity that in rule-making under the APA the agency can learn from comments on the proposals only at the peril of starting a new procedural round of commentary"). *See also United Steelworkers of America v. Schuykill Metal Corp.*, 828 F.2d 314, 318 (5th Cir. 1987) (court, noting that public comments expressly raised issue addressed in final rule, rejected claim that broad proposed OSHA rule did not adequately alert the public of the scope of the rulemaking and upheld the final rule) (following NPRM, agency had issued Federal Register notice of additional comment period concerning lead exposure protections).

When determining whether adequate notice exists in cases where the final rule does depart from the NPRM, the courts consider whether the final rule is a "logical outgrowth" of the NPRM and comments received by the agency.[38] The courts have held that a rule is a logical outgrowth of the proposed rule where the final rule and the proposed rule are part of a "superset" of rules.[39]

Telegate's proposals meet this test. The NPRM in this docket creates a superset of rules intended to promote competition in the provision of directory assistance. As we have noted above, the NPRM states that "directory assistance providers play an increasingly important role in ensuring that consumers receive the benefits of competition in all telecommunications-related services. We tentatively conclude that the presence of these directory assistance providers benefits competition, and that we should encourage such competition in the provision of directory assistance, whether or not the particular directory assistance provider also provides telephone exchange service or telephone toll service."[40]

Based on the quoted language, the Commission proposed to extend to all DA providers rights that are now enjoyed only by carriers. These proposals were sufficient to place interested parties on notice that the Commission is considering mandating

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38 *See e.g. Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (citing cases).

39 *See e.g. NRDC v. Thomas*, 838 F.2d 1224, 1243 (D.C. Cir. 1988) (even though agency adopted different system for calculating emissions than proposed in initial rule, court found proposed rule contained the "germ" of the final rule and upheld the measure); *Wilson & Co. v. United States*, 335 F.2d 788, 795 (7th Cir. 1964) (court found notice of intent to investigate tariffs to determine whether discrimination existed to be adequate for final investigation of the lawfulness of the particular parties' rates).

40 *NPRM*, 14 FCC Rcd at 15645.

significant changes in the directory assistance market. Telegate's proposals to eliminate major barriers to entry into the DA market is fully consistent with the purpose and scope of the NPRM. For these reasons, the Commission should thus not hesitate to consider and adopt Telegate's proposal in this proceeding.

VI. Conclusion

Telegate believes that the Commission should take the opportunity presented by the instant rulemaking to adopt rules that will fully open the directory assistance market to competition. To do this, the Commission must allow consumers to presubscribe to their preferred providers of directory assistance. As Telegate has demonstrated above, presubscription can be achieved for an extremely modest investment by making use of capabilities already broadly deployed in the U.S. telephone network. Telegate therefore respectfully requests that the Commission adopt the presubscription, balloting, and allocation rules outlined above.

Respectfully submitted,

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March 10, 2000